

The sole question to be determined on appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds, for the reasons stated below, claimant should be awarded benefits based upon a nine percent (9%) permanent partial disability for the period March 18, 1990 through May 11, 1993, and thereafter based upon a fifty-two percent (52%) permanent partial disability.

Claimant injured her left arm on March 18, 1990. She continued thereafter to work, favoring her left arm. As a consequence, she injured her right arm and shoulder. Her work activities also continued to aggravate the injury to her left arm and shoulder.

Claimant was initially treated by Dr. Fleming. He recommended conservative treatment and took claimant off work in May 1990. He released her to return to work in September 1990. Upon her return, she initially did paperwork and was then placed in the work pool. She continued working in the work pool and developed symptoms in the right arm and shoulder in July 1991. She was again taken off work in early August and was kept off work until September 1991. She thereafter returned, again to the work pool, and continued to work for respondent at a wage comparable to her pre-injury wage until she was laid off on May 11, 1993. The work she performed for respondent upon her return in 1990 and again in 1991 was not the same as the work she had performed prior to her injury. After the injury she worked in the work pool, an area which she described as being a temporary position until they could find a permanent job within her restrictions. In the work pool her work consisted primarily of clean-up and housekeeping.

Doctors Fleming, Mills and Jones all examined and evaluated claimant's physical impairment. Only Dr. Mills testified. He agreed with Dr. Fleming's rating of nine percent (9%) of the body as a whole. He also agreed with Dr. Fleming's restrictions. Dr. Fleming had recommended that claimant not use her right arm overhead, that she not repetitively grip or pull, and that she not lift more than twenty-five (25) pounds on one side and fifteen (15) pounds on the other. Although Dr. Jones did not testify, two vocational experts gave opinions without objection based on Dr. Jones' recommended restrictions. Dr. Jones had recommended that claimant not do repetitive activities such as pushing, pulling and lifting and that she avoid power tools.

Karen C. Terrill and Jerry D. Hardin testified regarding the effect of claimant's injuries upon her ability to perform work in the open labor market and her ability to earn wages comparable to those earned with the respondent. Based on the restrictions of Dr. Mills and Dr. Fleming, Mr. Hardin concluded claimant lost sixty-five to seventy percent (65-70%) of her ability to perform work in the open labor market. Based upon Dr. Jones' restrictions, he concluded the loss would be sixty-five percent (65%). He projected a post-injury wage of \$240 and from what he understood to be a pre-injury wage of \$616 per week, he calculated a sixty-one percent (61%) reduction of ability to earn a comparable wage.

Ms. Terrill testified that, based upon Dr. Fleming's restrictions, there would be a thirty-three percent (33%) loss of ability to perform work in the labor market and based upon Dr. Jones' restrictions there would be a sixteen percent (16%) loss. She stated that claimant had a zero percent (0%) wage loss during the period she continued to be

employed with respondent and thereafter would have a sixteen to twenty-nine percent (16-29%) loss of ability to earn a comparable wage. Her wage calculation compares a pre-injury hourly wage of \$14 to a projected post-injury wage of \$10-12 per hour.

The Special Administrative Law Judge awarded twenty-three percent (23%) permanent partial disability for the period from March 18, 1990 to May 11, 1993, when claimant was laid off. He did so based on a calculation which uses a zero percent (0%) wage loss because claimant was then earning a wage comparable to her pre-injury wage. He found a forty-five percent (45%) loss of ability to perform work in the open labor market by giving equal weight to the medical opinions and the opinions of the vocational experts. He then averaged loss of access and loss of ability to earn a comparable wage to find the resulting twenty-three percent (23%) permanent partial disability for the period from the date of accident to May 11, 1993 when claimant was laid off. As of May 11, 1993, the Special Administrative Law Judge increased the award to one based upon a fifty-five percent (55%) permanent partial general body work disability.

The Appeals Board finds that the award should be limited to the nine percent (9%) disability based upon the functional impairment ratings of Dr. Fleming and Dr. Mills for the period prior to May 11, 1993. The record reflects that until May 11, 1993, claimant continued to work at a wage which was comparable and, in fact, ultimately higher than that she had earned prior to the injury. The injury had, at that point, no practical impact on either her ability to earn comparable wage or her ability to perform work in the open labor market.

For the period after May 11, 1993, the Appeals Board agrees that the award should be increased to one based upon work disability. Each party argues, however, that there are deficiencies in the opinions given by the other's vocational expert. Respondent argues that Mr. Hardin's opinions regarding loss of access to the labor market are too high because he has included in the pre-injury labor market the heavy manual labor category solely because of claimant's work twelve (12) years prior to the injury doing some farm work with lifting of up to one-hundred (100) pounds. Claimant, on the other hand, challenges Ms. Terrill's opinions regarding loss of access on the basis of failure to include restrictions relating to gripping. The Appeals Board concludes that Ms. Terrill's opinions understate, and Mr. Hardin's overstate, the loss. The Appeals Board finds it reasonable to give these opinions equal weight. The Appeals Board therefore agrees with the finding by the Special Administrative Law Judge that claimant has a forty-five percent (45%) loss of ability to perform work in the open labor market.

Respondent points out that the Special Administrative Law Judge does not include the opinions of Ms. Terrill in his calculation of reduction in ability to earn a comparable wage. She did project a post-injury wage of between \$10-12 per hour after the layoff. Claimant's counsel, on the other hand, points out that the calculations made by the experts did not use the actual pre-injury average weekly wage. Mr. Hardin's opinions relied upon a \$616 per week wage. \$616.77 was the appropriate average weekly wage until May 11, 1993, when claimant was laid off and her fringe benefits terminated. See K.S.A. 44-511. After May 11, 1993, the average weekly wage was \$800.19. The award in this case for work disability begins as of May 11, 1993, and accordingly, the \$800.19 average weekly wage should be used when calculating the loss of ability to earn a comparable wage. When the \$800.19 is compared to the post-injury wage projected by Mr. Hardin, claimant would have a seventy percent (70%) loss of ability to earn a comparable wage. When compared to the post-injury wage projected by Ms. Terrill, claimant would have a forty-five

percent (45%) loss of ability to earn a comparable wage. Giving equal weight to both opinions, the Appeals Board finds that after May 11, 1993, claimant has a fifty-eight percent (58%) loss of ability to earn a comparable wage.

The Appeals Board also finds appropriate in this case to give the two work disability factors equal weight. See Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990). The Appeals Board therefore finds that the claimant has a fifty-two percent (52%) permanent partial general disability for the period after May 11, 1993.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated May 13, 1994, is hereby modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS in favor of the claimant, Dana K. Whisler, and against the respondent, The Boeing Company - Wichita, and the insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund for an accidental injury of March 18, 1990 for 15.14 weeks temporary total disability at the rate of \$271 per week, in the sum of \$4,102.94, 149.29 weeks compensation at the rate of \$37.01 per week, based upon an average weekly wage of \$616.77, in the sum of \$5,525.22, for 9% permanent partial general body disability, and 250.57 weeks of compensation at the rate of \$271 per week, based upon an average weekly wage of \$800.19, in the sum of \$67,904.47, for a 52% permanent partial general body work disability, making a total award of \$77,532.63.

As of April 7, 1995, there is due and owing claimant 15.14 weeks temporary total disability at the rate of \$271 per week, in the sum of \$4,102.94, 149.29 weeks compensation at the rate of \$37.01 per week, in the sum of \$5,525.22, and 99.43 weeks at the rate of \$271 per week or \$26,945.53, for a total of \$36,573.69 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$40,958.94 is to be paid for 151.14 weeks at the rate of \$271 per week, until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to \$350 is ordered paid to claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expense of administration of the Workers Compensation Act are hereby assessed one-half to the respondent and one-half to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey
Special Administrative Law Judge

\$150.00

Barber & Associates	
Transcript of Preliminary Hearing	\$70.40
Deposition of Dana Whisler	\$284.90
Deposition of Philip Mills, M.D.	\$156.00
Deposition of Jerry Hardin	\$340.60
Deposition of Dana Whisler	\$244.20
 Deposition Services	
Transcript of Regular Hearing	\$343.80
Deposition of Karen Terrill	\$415.20

IT IS SO ORDERED.

Dated this ____ day of April, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary K. Jones, Wichita, KS
Frederick L. Haag, Wichita, Ks
Andrew E. Busch, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director